

**UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF
CALIFORNIA**

Ray v. Cates

Ray · No. 1:22-cv-01504-CDB (PC) · Decided March 9, 2023

OPINION

(PC) Ray v. Cates

PER CURIAM.

1 2 3 4 5 6 7

8 UNITED STATES DISTRICT COURT

9 FOR THE EASTERN DISTRICT OF CALIFORNIA

10 11 EDWARD VINCENT RAY, JR., Case No. 1:22-cv-01504-CDB (PC) 12 Plaintiff,

FINDINGS AND RECOMMENDATIONS TO

DENY PLAINTIFF’S MOTION TO

13 v. PROCEED IN FORMA PAUPERIS AND

REQUIRE PLAINTIFF TO PAY THE

14 BRIAN CATES, et al., \$402.00 FILING FEE IN FULL

15 Defendants. (Doc. 2) 16

17 FOURTEEN (14) DAY DEADLINE

18 Clerk of Court to assign a district judge. 19

20 I. BACKGROUND

21 Plaintiff Edward Vincent Ray, Jr., is a state prisoner proceeding pro se in this civil rights 22
action filed under 42 U.S.C. § 1983. Plaintiff filed a complaint and a motion to proceed in forma
23 pauperis on November 21, 2022. (Docs. 1, 2.) Although this case is pending, Plaintiff re-filed
24 this case with photocopies of these pleadings on February 2, 2023, in Case No. 1:23-cv-00164-
25 GSA. 26 Upon review of Plaintiff’s prisoner litigation history and his complaint, the Court
finds 27 that Plaintiff had at least three “strikes” prior to filing the action and that Plaintiff was not
in 28 imminent danger of serious physical harm at the time he filed the action. Therefore, the
Court 1 recommends that Plaintiff’s motion to proceed in forma pauperis (“IFP”) (Doc. 2) be
denied 2 under 28 U.S.C. § 1915(g) and that Plaintiff be required to pay the \$402.00 filing fee in
full to 3 proceed with the action.

4 II. THREE-STRIKES PROVISION OF 28 U.S.C. § 1915(g)

5 28 U.S.C. § 1915 governs proceedings in forma pauperis (“IFP”). The statute provides: 6 In no
event shall a prisoner bring a civil action . . . under this section if the prisoner has, on 3 or more
prior occasions, while incarcerated or detained in any facility, 7 brought an action or appeal in a
court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails

to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury. 28 U.S.C. § 1915(g). This section is commonly referred to as the “three strikes” provision. *Andrews v. King*, 398 F.3d 1113, 1116 n.1 (9th Cir. 2005). “Pursuant to § 1915(g), a prisoner with three strikes or more cannot proceed IFP.” *Id.*; see also *Andrews v. Cervantes*, 493 F.3d 1310, 1047, 1052 (9th Cir. 2007) (holding that “[p]risoners who have repeatedly brought unsuccessful suits may entirely be barred from IFP status under the three strikes rule”). The objective of the Prison Litigation Reform Act is to further “the congressional goal of reducing frivolous prisoner litigation in federal court.” *Tierney v. Kupers*, 128 F.3d 1310, 1312 (9th Cir. 1997). Not all dismissed cases qualify as a strike under section 1915(g). *King*, 398 F.3d at 1121. In determining whether a case counts as a “strike,” “the reviewing court looks to the dismissing court’s action and the reasons underlying it.” *Knapp v. Hogan*, 738 F.3d 1106, 1109 (9th Cir. 2013). “Strikes are prior cases or appeals, brought while the plaintiff was a prisoner, which were dismissed on the ground that they were frivolous, malicious, or failed to state a claim.” *Id.* at 1116 n.1 (internal quotations omitted). Once a prisoner has accumulated three strikes, he is prohibited by 28 U.S.C. § 1915(g) from pursuing any other IFP action in federal court unless he can show he is facing “imminent danger of serious physical injury.” See 28 U.S.C. § 1915(g); *Cervantes*, 493 F.3d at 1051–52 (noting section 1915(g)’s exception for IFP complaints that “make[] a plausible allegation that the prisoner faced ‘imminent danger of serious physical injury’ at the time of filing”). To meet this burden, Plaintiff must provide “specific fact allegations of ongoing serious physical injury, or a pattern of misconduct evidencing the likelihood of imminent serious physical injury.” *Martin v. Shelton*, 319 F.3d 1048, 1050 (8th Cir. 2003). “[V]ague and utterly conclusory assertions” of imminent danger are insufficient. *Herbaugh v. San Diego Sheriff’s Dep’t*, 2018 WL 5024802, at *2 (S.D. Cal. Oct. 17, 2018) (quoting *White v. Colorado*, 157 F.3d 1226, 1231–32 (10th Cir. 1998)). The “imminent danger” exception is available “for genuine emergencies,” where “time is pressing” and “a threat . . . is real and proximate.” *Lewis v. Sullivan*, 279 F.3d 526, 531 (7th Cir. 2002); see *Blackman v. Mjening*, 1:16-cv-01421-LJO-GSA (PC), 2016 WL 85815905, at *1 (E.D. Cal. Oct. 4, 2016) (“Imminent danger of serious physical injury must be a real, present threat, not merely speculative or hypothetical.”). Additionally, to qualify for the imminent danger exception, the plaintiff must show a nexus between the imminent danger alleged and the claims asserted. In deciding whether such a nexus exists, [the court] will consider (1) whether the imminent danger of serious physical injury that a three-strikes litigant alleges is fairly traceable to unlawful conduct asserted in the complaint and (2) whether a favorable judicial outcome would redress that injury. The three-strikes litigant must meet both requirements in order to proceed [in forma pauperis]. *Stine v. Fed. Bureau of Prisons*, No. 1:13-cv-1883-AWI-MJS, 2015 WL 5255377, at *3 (E.D. Cal. Sept. 9, 2015) (quoting *Pettus v. Morgenthau*, 554 F.3d 293, 298–99 (2d Cir. 2009)). Because Plaintiff is pro se, in making the imminent danger determination the Court must liberally construe Plaintiff’s allegations. *Cervantes*, 493 F.3d at

1055 (9th Cir. 2007). 19 Upon a finding that the plaintiff is barred by the three strikes provision of 28 U.S.C. § 1915(g), the proper procedure is to dismiss the case without prejudice because the filing fee is 21 required when the action is initiated. *Campbell v. Vance*, No. CIV S-05-1163 RRB, 2005 WL 22 3288400, at *1 (E.D. Cal. Nov. 30, 2005) (citing *Dupree v. Palmer*, 284 F.3d 1234, 1236 (11th

23 Cir. 2002)). A plaintiff may still pursue his claims if he pays the civil and administrative filing 24 fees required by 28 U.S.C. § 1914(a).

25 III. DISCUSSION

26 A. Three Strikes Provision 27 The Court may take judicial notice of court records. *United States v. Wilson*, 631 F.2d 118, 28 119 (9th Cir. 1980). Here, the Court takes judicial notice of the following cases filed by Plaintiff 1 and dismissed for frivolousness or failure to state a claim, each of which counts as a “strike”: 1 2 (1) *Ray v. Schoo*, Case No. 5:10-cv-00942-VAP-PJW (C.D. Cal. Jan. 2, 2014) 3 (dismissing case for failure to state a claim upon which relief may be granted); 4 (2) *Ray v. Carter*, Appeal Case No. 14-17369, (9th Cir. Dec. 13, 2014) (finding 5 Plaintiff’s appeal was frivolous); 6 (3) *Ray v. Rogers*, Case. No. 5:16-cv-05483-EJD (N.D. Cal. Jan. 17, 2017) 7 (dismissing case for failure to state a claim upon which relief may be granted); 8 (4) *Ray v. Leal*, Appeal Case No. 16-16482, (9th Cir. Mar. 14, 2017) (dismissing case 9 for failure to state a claim upon which relief may be granted); 10 (5) *Ray v. Jefferson*, Case No. 4:16-cv-02652-YGR (N.D. Cal. Apr. 27, 2017) 11 (dismissing case for failure to state cognizable claims); and 12 (6) *Ray v. Basa*, Appeal Case No. 16-17290, (9th Cir. June 14, 2017) (dismissing 13 appeal as frivolous). 14 Based on the foregoing, the Court finds that Plaintiff had at least three “strikes” prior to 15 filing this action. Plaintiff is therefore subject to the section 1915(g) bar, and he is precluded 16 from proceeding IFP in this action unless, at the time he filed his complaint, he was under 17 imminent danger of serious physical injury. See *Cervantes*, 493 F.3d at 1052–53. 18 B. Imminent Threat Exception 19 1. Contaminated Water 20 The complaint contains an “Imminent Danger Allegation” and a claim asserting that he is 21 in imminent danger of serious physical injury because the water at CCI is contaminated with lead 22 and/or coliform bacteria, and it is used for drinking, showering, meal preparations, and clothes- 23 washing. (Doc. 1 at 3–4.) These sections of complaint are photocopies of pages in the complaint 24 filed by Plaintiff in *Ray v. Ribera*, No. 1:19-cv-01561-AWI-SKO (PC), 2019 WL 5887193 (E.D. 25 Cal. Nov. 12, 2019), F.&R. adopted, 2019 WL 6840153 (E.D. Cal. Dec. 16, 2019). 2 In *Ribera*, 26 before the complaint could be screened, this Court denied Plaintiff’s motion to proceed in forma 27 1 This list is non-exhaustive. 28 2 In the Imminent Danger Allegation in this case, Plaintiff added a single line that states, 1 pauperis (“IFP”) and then dismissed the complaint for Plaintiff’s failure to pay the filing fee as 2 ordered. This Court determined that Plaintiff had three or more strikes under 28 U.S.C. § 1915(g) 3 and he was not under imminent danger of serious physical injury at the time of filing the 4 complaint. *Ribera*, 2019 WL 6840153, at *1. In making this determination, without ruling on the 5 claims on the merits, the Court found: “As an initial matter, Plaintiff provides no basis for the 6

allegation that the prison's water supply is contaminated or that he is being poisoned." (Id.) 7 In the instant case, the Court has again reviewed Plaintiff's allegations concerning 8 contaminated water. Plaintiff states only that it is "common knowledge" that CCI was 9 constructed at a time when people were not aware of the dangers of using lead pipes and that no 10 amount of lead or other contaminants is acceptable. Plaintiff asserts this is why bottled water is 11 so popular worldwide, and CCI employees carry bottled water every day "for their own 12 protection." (Doc. 1 at 4.) These assertions are speculative and do not support Plaintiff's claim 13 that the water at CCI is contaminated or that he is being poisoned. The Court again finds that 14 Plaintiff fails to provide a factual basis for his conclusory allegation of imminent danger based 15 on contaminated water. 16

2. Integration of Violent and Nonviolent Inmates 17 Plaintiff raises a second, unrelated claim that Defendants are forcing him to be housed 18 with "known enemies." (Id. at 5.) Plaintiff was an inmate housed in general population ("GP 19 inmate") for six years but is now a sensitive needs yard inmate ("SNY inmate"). On November 20 19, 2018, Plaintiff was transferred to a Non-Designated Programming Facility ("NDPF"), where 21 GP and SNY inmates are integrated. 22 According to Plaintiff, the two "factions" are "mortal enemies," and the more violent GP 23 inmates constantly label, threaten, target, attack, and attempt to hurt or kill SNY prisoners. (Id.) 24 He alleges that GP inmates constitute gangs who engage in criminal activity and control NDPFs, 25 while "Defendants turn a blind eye to, and/or cannot control" the GP gangs' illegal acts. (Id.) 26 Plaintiff alleges he has been spat on, kicked, punched, extorted, and pushed; he has suffered 27 several black eyes and bruised ribs; his property has been stolen; and he is slandered on a daily 28 basis. 1 While Plaintiff has suffered some physical injuries in the past, he has not alleged the 2 attacks were committed by known GP inmates, committed because he was an SNY inmate, or the 3 result of NDPF integration of inmates. The allegations of violence are vague and do not specify 4 when the attacks occurred. Moreover, Plaintiff waited two years to file this action after being 5 moved to the NDPF with the violent GP gangs. Even accepting Plaintiff's allegations are true, the 6 Court finds that Plaintiff has failed to demonstrate he was in imminent danger at the time he filed 7 this action.

8 III. CONCLUSION

9 Plaintiff is a "three-striker" and does not appear to have been in imminent danger when 10 he filed this action. 11 Accordingly, it is RECOMMENDED that: 12 1. Plaintiff's motion to proceed in forma pauperis, (Doc. 2), be denied; and 13 2. Plaintiff be ordered to pay the \$402.00 filing fee in full if he wants to proceed 14 with this action.³ 15 These findings and recommendations will be submitted to the United States District Judge 16 assigned to the case pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen (14) 17 days after being served with these findings and recommendations, Plaintiff may file written 18 objections with the Court. The document should be captioned, "Objections to Magistrate Judge's 19 Findings and Recommendations." Plaintiff is advised that failure to file objections within the 20 specified time may result in the waiver of rights on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834, 21 /// 22 /// 23 24 3 This Court and other

courts within the Circuit have denied or revoked Plaintiff's IFP status in numerous other cases. See, e.g., Ray v. Sullivan, Case No. 1:20-cv-01699-NONE-HBK 25 (PC) (E.D. Cal. June 2, 2021); Ray v. Chefalo, Case No. 1:20-cv-01515-AWI-GSA (PC) (E.D. 26 Cal. Jan. 20, 2021), affirmed, No. 21-15238 (9th Cir. Sept. 1, 2021); Ray v. Ribera, Case No. 1:19-cv-01561-AWI-SKO (PC) (E.D. Cal. Dec. 16, 2019), affirmed, 2022 WL 2817484 (9th Cir.

27 July 19, 2022). Typically, in such cases, the Court ordered Plaintiff to pay the filing fee and dismissed the action for Plaintiff's failure to comply and pay the fee. Plaintiff routinely appeals 28 judgments based on the denial of IFP, but the judgments are affirmed or the appeals are dismissed 1 | 838-39 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)). 2 The Clerk of Court is directed to assign a district judge to this case. 3 | IT IS SO ORDERED. "| Dated: _March 9, 2023 | hr

5 UNITED STATES MAGISTRATE JUDGE

6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28